79-499

No. 79-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EASTMAN KODAK COMPANY,

Petitioner,

v.

BERKEY PHOTO, INC.,

Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Eastman Kodak Company ("Kodak") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit insofar as it remanded for retrial certain claims against Kodak under § 2 of the Sherman Act, the writ to issue only in the event the Court should grant the petition for a writ of certiorari in No. 79-427.

Opinions Below

The opinion of the court of appeals (3a-101a)[1] is unofficially reported at [1979-1] TRADE CASES (CCH) ¶ 62,718. The opinions of the district court (102a-179a) are reported at 457 F. Supp. 404.

[1] The opinions below are reproduced in a separate appendix volume submitted with the petition in No. 79-427, and "—a" page references are to that volume.

Jurisdiction

The judgment of the court of appeals was entered on June 25, 1979 (1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the court of appeals err in not entering judgment for Kodak on the film and color print paper claims, and instead remanding both claims for a determination of whether "conduct occurring many years before the commencement of suit contributed to an overcharge . . . within the limitations period" (75a)?

2. Should judgment have been entered for Kodak on the photofinishing services and equipment claims, since "it is clear that Kodak did not monopolize or attempt to monopolize" those markets (58a)?

Statutes Involved

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 88 Stat. 1708, 15 U.S.C. § 2; Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15; Section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. § 15b; and Section 16 of the Clayton Act, 38 Stat. 737, as amended, 90 Stat. 1396, 15 U.S.C. § 26, are set forth as an addendum hereto.

Statement of the Case

Plaintiff Berkey Photo, Inc. ("Berkey") claims that Kodak should be held liable in treble damages under § 4 of the Clayton Act for "overcharges" on film and paper purchased by Berkey from Kodak in and after 1969.

Berkey also claims treble damages in connection with Kodak's sale of photofinishing services and equipment pertaining to a new photographic system introduced by Kodak in 1972, and, under § 16 of the Clayton Act, injunctive relief relating to the photofinishing business. All such claims for relief are based on alleged violations of § 2 of the Sherman Act.[2]

The district court[3] held that Kodak could be liable on Berkey's "overcharge" claims only for unlawful conduct continued into or occurring within the 4-year period of limitations prescribed by § 4B of the Clayton Act, a period commencing in 1969. The district court did, however, allow Berkey to introduce, for "background" purposes, evidence of alleged unlawful acts occurring prior to 1969—principally the introduction by Kodak in 1963 of the "Instamatic" system and a 1954 consent decree pertaining to processing of color photography (see 9a-13a). Evidence was also ultimately received on certain actions taken by Kodak as far back as the turn of the century (91a-94a).

Berkey's principal claim of unlawful conduct within the statutory period was that Kodak violated § 2 of the Sherman Act by its introduction in 1972 of a subminiature camera, the "Pocket Instamatic," and a new film size and new fine-grain color film, "Kodacolor II," for use with it. This new "110" system allegedly injured Berkey in a number of markets, including the film and paper markets. With respect to the paper market, however, Berkey primarily attacked Kodak's 1971 introduction of a new, faster "3-step" paper and process.

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[2] This petition does not seek review of the rulings below with respect to Berkey's claims based on § 1 of the Sherman Act.

[3] The district court had jurisdiction under 28 U.S.C. § 1331(a), 15 U.S.C. § 15 and 15 U.S.C. § 26.

Berkey did not allege or prove that these or any other allegedly unlawful acts were connected with any increment in the prices of Kodak's film or paper, or that any relationship existed between the alleged violations and prices. It was also undisputed that competing products were available for purchase by Berkey throughout the statutory period and at lower prices.

Berkey received verdicts in the amounts, before trebling, of $11,250,000 on "overcharges" for all types and sizes of Kodak film purchased by Berkey from 1969 through 1977, $8,803,000 on "overcharges" of color print paper from 1969 through 1977, $19,000 on "overcharges" for photofinishing equipment in 1972, and $55,700 for lost photofinishing profits in 1972 (188a-189a).

The district court granted Kodak's motion for judgment notwithstanding the verdict on the paper claim, but sustained the film award (126a-138a). The district court also sustained the photofinishing awards, despite the fact that Kodak had not been found to have monopolized or attempted to monopolize the photofinishing or photofinishing equipment markets (120a-122a, 138a-140a), and it awarded injunctive relief as well (147a, 155a).

The court of appeals held, *inter alia,* that the 1972 introduction of the 110 system was not unlawful, that neither that introduction nor the single other violation found by the district court could "have had a very large impact on Kodak's film prices" (75a) and that the district court had erred as to the measure of damages (71a-74a). The court also held, however, that conduct wholly antedating the period of limitations could provide the basis for recovery, and remanded the film claim for a new trial (67a-71a, 75a). For the same reason, it remanded the paper claim for retrial (*ibid.*).

The court of appeals also remanded the photofinishing claims for determination of whether Kodak had "gained a competitive advantage" in those markets by use of monopoly power in other markets (56a-61a).

Reasons for Granting the Writ

Since the court of appeals' rulings on Berkey's film, paper and photofinishing claims are interlocutory and further proceedings below may (and we expect, will) render them moot as between the parties, the Court might consider that the questions here presented do not now warrant review on certiorari. But if the Court determines to grant Berkey's petition in No. 79-427, it should consider these questions as well.

I.

The decision below negates the statute of limitations and is contrary to the controlling decisions of this Court, the decisions of other circuits, and the common law.

The holding below that damages may be awarded solely on the basis of "conduct occurring many years before the commencement of suit" (75a) is contrary to controlling decisions of this Court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971):

> "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."

Here, Berkey has claimed that every violation, whenever occurring, had the immediate effect of maintaining monopoly power and prices. The cause of action as to each alleged violation consequently accrued at the time of the act.

Berkey's contention that pre-1969 conduct had continuing effect into the statutory period provides no basis for an exception to the established rules of accrual.[4] The holding below to the contrary conflicts with decisions by courts of appeals in other circuits under the Clayton Act. *See Poster Exchange Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975):

> "[A] . . . claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." [5]

See also AMF, Inc. v. *General Motors Corp.*, 591 F.2d 68 (9th Cir. 1979); *Harold Friedman Inc.* v. *Thorofare Markets Inc.*, 587 F.2d 127, 139 n.45 (3d Cir. 1978). It also conflicts with the common law, *e.g., Northern Ky. Tel. Co.* v. *Southern Bell Tel. & Tel. Co.*, 73 F.2d 333, 335 (6th Cir. 1934), *cert. denied*, 294 U.S. 719 (1935):

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[4] A cause of action does not accrue when an unlawful act is first committed only in two circumstances: (1) when accrual of the cause of action is delayed because of the uncertainty of injury and damage, *Zenith*, 401 U.S. at 339, and (2) where the tort is one actually continuing into the statutory period, such as overt acts in furtherance of a prior conspiracy or continued enforcement of unlawful agreements, *id.* at 338; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968).

[5] *See also* the authorities cited by this Court in *Zenith, e.g., Momand* v. *Universal Film Exchange*, 43 F. Supp. 996, 1006 (D. Mass. 1942) (Wyzanski, J.), *aff'd*, 172 F.2d 37, 49 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *Farbenfabriken Bayer, AG* v. *Sterling Drug, Inc.*, 153 F. Supp. 589, 593 (D.N.J. 1957), *modified on other grounds*, 197 F. Supp. 627 (1961), *aff'd*, 307 F.2d 210 (3rd Cir. 1962), *cert. denied*, 372 U.S. 929 (1963):

> "The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable statute of limitation."

> "[W]hen there is an overt act, or the last of a contemplated series of overt acts, the cause of action accrues and the statute of limitations begins to run. If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficent purpose of the statute to put a period to the right to sue would be defeated."

Congress clearly had this "beneficent purpose" in mind in enacting a "uniform four year statute of limitations" for private antitrust damage actions. *See* 101 Cong. Rec. 5132-33 (1955) (rejecting an amendment delaying "accrual" until discovery, because the "defendant would be put in a rather deplorable situation" if he had to defend conduct engaged in more than four years prior to suit).

The rule enunciated below in large measure defeats the function of a statute of limitations as a statute of peace and repose, *United States* v. *Marion*, 404 U.S. 307, 322-23 n.14 (1971); *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945); *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), and, in the context of alleged monopoly "overcharges," necessarily confronts major business enterprises with an unavoidable dilemma. A corporate manager can only price his product—in the case of amateur film, a discretionary consumer expenditure—in terms of existing market conditions; he cannot alter reality to determine what the product might sell for if his predecessors had not years before engaged in some act now alleged to be monopolistic. To require him to labor daily under the yoke of past alleged misdeeds is not to do human justice but to impose an unjust and bewildering ordeal in which rational economic behavior is condemned.

This is not a case where the fact and quantification of injury by reason of old allegedly wrongful acts were even arguably speculative until some time within the statutory period. Consequently, not only is there no basis for permitting inquiry into alleged past misdeeds because recovery could not have been had earlier (see note 4, page 6 above), but there is every reason to believe that the failure of Berkey or anyone else to sue earlier was due to their recognition that no actionable conduct had in fact occurred. *See United States* v. *Marion*, 404 U.S. at 322-23 n.14, citing *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390 (1869): "statutes [of limitations] 'are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected.' "

II.

Because Kodak did not monopolize or attempt to monopolize the photofinishing markets, it did not violate § 2 of the Sherman Act in those markets.

Kodak at all relevant times possessed less than 15% of the market for photofinishing services, and no attempt was even made to define a photofinishing equipment market. The damage verdicts in both markets—based on Kodak's headstart in sales of "110" photofinishing services and equipment in 1972—were grounded in Berkey's theory that Kodak, though not monopolizing or attempting to monopolize the markets, had gained a "competitive advantage" in them by virtue of introducing the 110 system in 1972. (120a-122a)

Such a "competitive advantage," cannot be unlawful under § 2 unless it amounts to monopolization or attempted monopolization, for the statute on its face prohibits no

other type of non-conspiratorial conduct. This Court's decision in *United States* v. *Griffith*, 334 U.S. 100 (1948), relied upon below (22a-25a; 56a-61a) is not to the contrary, and were it, the plain language of the statute would nonetheless control.

Conclusion

If a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit, it should issue to review those aspects of the court's decision discussed above.

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Addendum

Text of Statutes Involved

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 88 Stat. 1708, 15 U.S.C. § 2, provides:

> "§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides:

> "§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. § 15b, provides:

> "§ 4B. Any action to enforce any cause of action under sections 4, 4A or 4C shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

Section 16 of the Clayton Act, § 38 Stat. 737, as amended, 90 Stat. 1396, 15 U.S.C. § 26 provides:

> "§ 16. Any person, firm, corporation, or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff. . . ."

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BRIEF FOR RESPONDENT ON THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Petition for a Writ of Certiorari filed on behalf of Berkey Photo, Inc. ("Berkey") in No. 79-427, presently pending before this Court, Berkey prays for review of a judgment and opinion entered in this cause on June 25, 1979 by the United States Court of Appeals for the Second Circuit. The instant brief is submitted in response to Eastman Kodak Company's ("Kodak") Cross-Petition for a Writ of Certiorari seeking review of the same judgment and opinion.

Questions Presented

In its petition in 79-427, Berkey urged, and we submit demonstrated, the urgent need for Supreme Court review

of this case to resolve critically important questions of interpretation of Section 2 of the Sherman Act. The formulation of issues and more detailed statement of the case there presented will not here be repeated, but is relied upon to acquaint the Court with the relevant context of the matter. In responding to the instant cross-petition, we do not gainsay the importance of the issues raised in either petition, but emphasize that the Court of Appeals and both parties have manifested a recognition of the new, important and complex issues under Section 2 of the Sherman Act which are here involved. We do, however, contend that Kodak's cross-petition does not accurately focus on the applicable facts and law. On the record herein, the questions presented by the cross-petition are:

1. In an action by a direct purchaser which was overcharged during the statute of limitations period[1] by a persistent monopolist, may a jury consider conduct by the monopolist prior to the limitations period where, as was here held by the Court of Appeals, the quantum of the overcharge must be specifically related to culpable conduct tending to create or maintain the monopoly?

2. Is wrongful use or "leveraging" of monopoly power to gain competitive advantage in a related market a violation of Section 2 of the Sherman Act without an additional violation of monopolization or attempt to monopolize in the related market?

Counterstatement

a. The Overcharge Claims

Berkey's claim for treble damages as an overcharged direct purchaser of amateur conventional film and color

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[1] The complaint herein was filed on January 29, 1973. Accordingly, the limitations period here referred to is from and after January 29, 1969.

paper was based on, *inter alia*, proof that Kodak had, during the limitations period, violated Section 2 of the Sherman Act by monopolizing the relevant markets for such film and paper. The jury awarded single damages to Berkey of $11,500,000 for film overcharges and $8,803,000 for paper overcharges within the limitations period (188a).[2] The District Judge upheld the award of damages for film overcharges (127a-28a) but set aside the award in the paper market, concluding that there was not "the required proof of exclusionary or anticompetitive conduct" (133a). The District Judge had ruled that evidence of Kodak's exclusionary conduct prior to the limitations period was not to be considered in deciding if Kodak's monopoly during the statutory period was created or maintained in any part by such earlier conduct, or in quantifying the damages.[3]

The Court of Appeals did not specifically comment upon the adequacy of the proof of exclusionary conduct during the limitations period with respect to either the film or

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[2] Roughly 15% of the purchase price paid by Berkey to Kodak and reflecting a still extravagant profit rate for Kodak on those sales. (See Petition in 79-427, nn. 8, 45.)

[3] Kodak inaccurately contends (Cross-Petition, pp. 3-4) that Berkey relied solely on Kodak product introductions as the anticompetitive conduct by which Kodak secured and maintained its monopoly power in these markets. The proof demonstrated a variety of exclusionary practices, some of which were associated with product introductions. (See 128a, where the District Court referred to certain exclusionary practices in film, clearly labeled as illustrations, and which are not limited in the manner Kodak describes; see 134a regarding paper). Moreover, as a matter of law, Section 2 is violated by a showing of monopolization by means of conduct which is exclusionary or anticompetitive even though not independently unlawful. Kodak's contention (Cross-Petition, p. 3) that the District Court limited liability to "unlawful conduct" is thus untenable and flouts the opinions of the District Court (see, *e.g.*, 105a-06a, 126a-28a).

paper markets (see Petition in 79-427, pp. 7, 19). It remanded, however, for further proceedings, because it found that an erroneous measure of damages had been employed in the District Court.[4] The Court also reversed the District Judge and ruled that, on remand, Berkey should also be permitted to rely on conduct antedating the statutory period creating or maintaining the monopoly, and attempt to relate such conduct to the violation and injuries during the limitations period for which damages are claimed in both the film and paper markets (75a). Accordingly, based on rulings by the Court of Appeals, which are the subject of petitions for certiorari by both sides, the proceedings on remand will involve the arduous and complex review of conduct by Kodak over 60 years or more and an effort to relate such conduct to price increments since 1969. (See also Petition in 79-427, p. 35 and n. 47). Significantly, the original trial of this action took over eight months even though limited to testing events since 1969.

b. The Leveraging Claims

The jury specifically found that Kodak had misused its monopoly power in the film market to gain competitive advantage and injure Berkey in the photofinishing market where both competed (183a), *i.e.*, leveraged its film monopoly into the photofinishing market.[5] The jury also found that Berkey had not proven that Kodak had attempted to monopolize the latter market (184a). Single damages were awarded to Berkey for lost profits as a photofinisher ($55,700) and for overcharges on photo-

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[4] The petition in 79-427 seeks review of the Court of Appeals' conclusions on the manner of proving damages, which articulated what was recognized to be an unprecedented requirement that particular anticompetitive acts over a long period of time must be related to Kodak price increments during the limitations periods.

[5] Leveraging into other markets was also there found.

finishing equipment bought from Kodak ($19,000) (188a-89a). The District Court and Court of Appeals concluded that a Section 2 violation could be found when a company misuses its monopoly power in a relevant market, to gain competitive advantage over those with which it competes in a related market, even when it has not separately monopolized or attempted to monopolize the related market (22a-25a, 121a-22a). The Court of Appeals, however, remanded this claim for further proceedings to determine whether the elements of the offense there described had been proven (60a-61a), without clarifying how the retrial of this claim was to differ from the original trial (see also Petition in 79-427, pp. 16-17).

ARGUMENT

I. The Unusual Circumstance of Both Sides Seeking Certiorari to Review the Same Judgment and Opinion Confirms the Need for Early Supreme Court Review of Questions Which Are Fundamental to Further Conduct of This Case.

The opinion of the Court of Appeals repeatedly noted the importance and novelty of the issues involved in this case (*e.g.*, 5a, 7a). Berkey's petition in 79-427 confirmed those observations and sought review of several matters decided adversely to Berkey's claims. In its cross-petition, Kodak argues that the Court of Appeals erroneously decided other important questions which have obvious and immediate implications for Section 2 litigation generally. Manifestly, such unanimity should strongly militate in favor of review by this Court of questions whose importance for Section 2 jurisprudence is beyond doubt. Moreover, the initial question raised by Kodak's cross-petition is inextricably intertwined with issues which, as was demonstrated in the petition in 79-427 and nowhere

contravened, have not previously been addressed in a suit for overcharges by a monopolist (see Petition in 79-427, pp. 34-35).

Rulings which are the subject of both petitions are based on reversals of determinations made by the District Judge during the course of an eight-month trial and extensive post-trial proceedings. The retrial, involving conduct over so much longer time and elusive hypothetical economic relationships, could well take even longer. If the District Court's original rulings were correct, all of this is avoidable. If the Court of Appeals has erred (the District Judge and both parties obviously believe that it did), these extended proceedings would be a cruel waste of judicial effort and the resources of the litigants. Accordingly, Kodak's suggestion (Cross-Petition, p. 5) that this Court deny review of the issues which are fundamental to the further conduct of the case because of an alleged lack of finality, invites wasteful and extensive proceedings on matters which can now be reviewed by this Court on a record which was compiled after a full and complete trial. Moreover, Kodak's cross-petition also involves Section 2 issues which are closely related to those which are presented for review in connection with Berkey's camera claims, as to which no further proceedings have been directed.[6] (See also Berkey's Reply Brief in 79-427, demonstrating that the lack of utter finality relied on by Kodak does not preclude review.)

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[6] Illustratively, Kodak urges, in opposing certiorari in 79-427, that determinations made in connection with cameras, which are questioned in that petition, are controlling with respect to the film and paper claims. (See Berkey's Reply Brief in 79-427, further demonstrating the inappropriateness and likelihood of waste inherent in the conduct of a further trial without review by this Court.)

II. The Cross-Petition Has Not Demonstrated That the Court of Appeals Erroneously Decided the Issues Which Kodak Presents for Review.

Kodak urges that the conclusion reached by the Court of Appeals on the relevance of pre-statute of limitations conduct is at variance with applicable precedent and statutory authority (Cross-Petition, pp. 5-8). We strongly disagree and submit that this aspect of the opinion below is supported by several decisions of this Court.[7] Moreover, as the Court of Appeals observed (69a), a contrary result would be erroneous as a matter of policy since it would grant illegal monopolists a wholly inappropriate immunity from suit for overcharges.

Recognizing, however, the importance of the question, which had originally been resolved by the District Judge contrary to the more recent conclusion by the Court of Appeals, and that this question is inextricably interwined with issues raised in the petition in 79-427, we urge that the matter be resolved with certainty before the parties undertake a further trial which would involve extensive evidence of pre-limitations period conduct.

Kodak's contention (Cross-Petition, pp. 8-9) that it did not violate Section 2 of the Sherman Act by misusing, or leveraging, its film monopoly to gain advantages over its competitors in the photofinishing and other markets is not well-founded. Kodak cites no case which suggests that such leveraging is lawful in the absence of the separate offense of monopolization or attempt to monopolize in the related market. A variety of precedents support the re-

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[7] *E.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-40 (1971); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 502 n. 15 (1968); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 709-10 (1962).

sult reached by the Court of Appeals.[8] If there were, however, any doubt about the issue it should be resolved before a retrial, particularly in view of the lack of clarity on the standards applicable to further proceedings (see Berkey's Reply Brief in 79-427, pp. 7-8).

Conclusion

In a case of such wide interest and great moment, the Court of Appeals reached what it described as novel results on undecided questions in reversing so substantially the legal conclusions of the District Court. Both sides have filed petitions for certiorari. We submit that it is in the national interest, the interests of most effective use of precious judicial resources and the interests of the parties to this and other pending Section 2 cases, to grant certiorari and resolve the important questions here involved without wasteful delay or further proceedings.

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[8] *E.g., Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973); *United States* v. *Griffith,* 334 U.S. 100 (1948); *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359 (1927); *Greyhound Computer Corp.* v. *IBM Corp.,* 559 F.2d 488 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978); *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 438 (2d Cir. 1945).

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